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FEB 17 1947
CHARLES ELMORE CROPLEY
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No. 928

In the Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL TRADE COMMISSION, *Petitioner*,

vs.

NORTHWESTERN PORTLAND CEMENT COMPANY, *Respondent*

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE ARGUS PRESS, SEATTLE

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STATUTES

Clayton Act, §2, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U.S.C. §13	2
Federal Trade Commission Act, §5, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U.S. C. §45	2

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Northwestern Portland Cement Company opposes the issuance of a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered on October 31, 1946, setting aside an order of the Federal Trade Commission entered July 17, 1943.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 16761) is reported in 157 F.(2d) 533.

STATEMENT

On July 2, 1937, the Federal Trade Commission filed its complaint, naming as respondents this company, seventy-four other corporations engaged in the manufacture or sale of cement, and The Cement Institute, its president and former secretary, its officers and trustees, alleging, in count one, a combination or con-

spiracy in violation of Section 5 of the Federal Trade Commission Act to restrict and restrain price competition among producers and sellers of cement by use of what was termed a multiple basing-point delivered-price system,[1] and further alleging, in count two, discrimination in price between purchasers in different localities in violation of Section 2 of the Clayton Act.[2] On July 17, 1943, the Commission entered its Order to Cease and Desist.[3] On petition to review the Commission's Order, the Court below, in an opinion rendered on September 20, 1946, held the Commission's Order void.[4] The Court's judgment and decree, in conformity with its opinion, was entered October 31, 1946.[5]

This Respondent is appearing separately in this Court to maintain the individual position it has taken throughout the proceedings below.

Northwestern Portland Cement Company has already been subjected to a decade of expensive and protracted litigation.

REASONS FOR NOT GRANTING THE WRIT

With reference to the questions that are common to all the respondents in the series of cases brought to this Court by the Petitioner, we adopt the arguments made in the briefs filed in the related cases opposing the petition for writs of certiorari, and urge, as is done there, that the decision below is not in probable

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[1]R. 91-93, 117, 128, 133, 144, 153, 160, 164, 171, 177.
[2]R. 218, 223-224, 241, 249.
[3]R. 16136-16137.
[4]R. 16761-16816.
[5]R. 16828.

conflict with applicable decisions of this Court, that the questions presented in the petition are not within Rule 38, Paragraph 5(b), of the Rules of this Court, and that the basic holding of the Circuit Court of Appeals is not presented in any of the three questions, although it appears as the first error specified.

Respondent would call the Court's attention to the fact that Northwestern Portland Cement Company has consistently contended that it is not subject to the jurisdiction of the Federal Trade Commission because it is not engaged in interstate commerce. The Commission found that Northwestern Portland "makes no sales or shipments outside the State of Washington."[6] Both the Federal Trade Commission Act and the Clayton Act, as amended, refer to interstate commerce only.

Although admitting the intrastate character of Respondent's business, the Commission, by the use of broad and sweeping generalizations,[7] attempted to infer that Northwestern Portland Cement Company engaged in all or most of the alleged activities and practices charged to be illegal even though there is no evidence in the record to that effect. Except for the finding that it was at one time a member of The Cement Institute,[8] the Commission made no specific findings that this company engaged in any of the activities or practices upon which the Commission sought to build its case of combination or conspiracy.

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[6]R. 15979.

[7]See, for example, pp. 10 and 11 of the Petition for Certiorari.

[8]R. 15972.

In discussion of the Findings the Court below said:

> "Certainly there is not even an inference that the system was used either in California or in Washington in connection with any combination or conspiracy."[9]

Upon such a record, the judgment vacating and setting aside the order of the Federal Trade Commission should not be disturbed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied because the government has not stated any satisfactory reason for granting the writs of certiorari as to any respondent before the Court, and, particularly, has not stated any adequate reason for granting the writ of certiorari as to Northwestern Portland Cement Company.

Respectfully submitted,

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[9] R. 16782.